CONSTITUTIONAL COURT OF SOUTH AFRICA

Mawanda Makhala and Another v The State

CCT 237/22
Date of hearing: 15 February 2024
Date of judgment: 20 December 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 20 December 2024 at 10h00, the Constitutional Court handed down a judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal dated 18 February 2022.

The first applicant, Mr Mawanda Makhala (Mr Makhala), is a former clerk in the housing department in the Knysna Municipality. The second applicant, Mr Velile Waxa (Mr Waxa), is a former independent councillor of the Knysna Municipality.

The applicants were convicted in 2021 in the High Court, Western Cape, Eastern Circuit Local Division (Knysna), of murder, possession of an unlicensed firearm and unlawful possession of ammunition. They were each sentenced to life imprisonment for the murder, and five years' imprisonment on the remaining counts, which were ordered to run concurrently. The convictions and sentences relate to the murder of Mr Mzukisi Molosi (Mr Molosi) in 2018. At the time of his murder, Mr Molosi was a councillor at the Knysna Municipal Council (Council).

The police officers appointed to investigate the murder received information that the first applicant was seen at the Pop Inn Tavern in Concordia, Knysna, on the weekend before the murder, with two other persons, one of whom was his brother, Mr Luzuko Makhala. On 1 August 2018, one of the police officers, Sergeant Wilson, traced Mr Luzuko Makhala and the latter confirmed that he was in the area during the weekend before the murder. Mr Luzuko Makhala said that he had given a lift to an unknown man in the Eastern Cape and that he indeed drove to Knysna over the weekend before the murder. Subsequently, Sergeant Wilson viewed camera footage of the N2 highway,

which showed that Mr Luzuko Makhala's vehicle was travelling from Cape Town to Knysna on 22 July 2018, a day before the murder.

According to Sergeant Wilson, Mr Luzuko Makhala indicated that he wished to recount his part in the murder of Mr Molosi. His constitutional rights were explained to him. He was also informed that the plan was to utilise his evidence as a witness under section 204 of the Criminal Procedure Act (CPA).

The first and second statements given by Mr Luzuko Makhala incriminated him, the two applicants and Mr Dumile in the murder of Mr Molosi. The trial court admitted the first and second statements into evidence and relied upon these statements, along with circumstantial evidence, to convict the applicants of murder and the related counts.

The applicants appeared in the High Court, Western Cape, Eastern Circuit Local Division. Mr Luzuko Makhala was amongst the witnesses called by the State to give evidence. Without forewarning to the prosecution, Mr Luzuko Makhala recanted the contents of his first and second statements that incriminated him and the applicants in the murder.

In considering the admissibility and probative value of the statements, the trial court, firstly, considered whether Mr Luzuko Makhala was the principal source of the statements and whether he was forced by the police to make the statements and did not do so freely and voluntarily. The trial court found that the evidence of Colonel Ngxaki and Sergeant Mdokwana, who took down the statements, was overwhelmingly convincing and corroborated by Sergeant Wilson. Mr Luzuko Makhala was found to be the author, originator and principal source of the two statements and that they were made freely and voluntarily.

As a result of the fact that Mr Luzuko Makhala had recanted the statements, the trial court considered whether the first and second statements should be admitted into evidence in terms of section 3(1) of the Law of Evidence Amendment Act (Hearsay Act). Upon a consideration of the factors listed in section 3(1)(c) of the Hearsay Act, the trial court admitted the two statements into evidence. The trial court considered the risk of falsity to be minimal.

The applicants appealed to the Supreme Court of Appeal which considered whether the two statements were obtained in violation of Mr Luzuko Makhala's rights under section 35(5) of the Constitution or in breach of the common law. The court found that the trial court properly applied the cautionary rule applicable to the evidence of an accomplice, and that there was sufficient corroborative evidence to convict the applicants. The Supreme Court of Appeal further held that the trial Judge correctly found that there was sufficient evidence to corroborate the statements of Mr Luzuko Makhala and that, upon consideration of all the evidence, the State had discharged its burden of proof. The court dismissed the appeal.

Before this Court, the applicants challenged their convictions on the basis that Mr Luzuko Makhala's statements are the only evidence which implicate the applicants. They challenged the admissibility of the section 204 statements, which constitute the only evidence relied on by the trial court to convict and sentence them.

The applicants further contended that the first section 204 statement made by Mr Luzuko Makhala to Colonel Ngxaki constitutes a confession, which in terms of section 219 of the CPA cannot be used as evidence to incriminate anyone but the maker. They argued that when Mr Luzuko Makhala later recanted his statements, he deprived them of the opportunity to challenge the evidence contained in the statements. The applicants contended that this was a violation of section 35(3)(i) of the Constitution, which provides for the right to challenge and adduce evidence.

The State argued that section 204 statements generally serve as prosecutorial and crime control tools useful for putting an end to organised crime and that the statements made by Mr Luzuko Makhala do not constitute confessions as they are not statements that adversely affect him and therefore fall outside the ambit of section 217 of the CPA. The State contended that calling Mr Luzuko Makhala to the stand and cross examining him was essential for "the court's assessment of the probative value and reliability of his prior statements". The State contended that the statements are also not admissions and therefore fall outside the ambit of section 219A of the CPA.

In the first judgment, which holds majority, penned by Tshiqi J (Madlanga ADCJ, Majiedt J, Mathopo J, Mhlantla J and Theron J concurring), this Court held that the matter engages this Court's jurisdiction on the basis that the matter raises legal questions whether there can be reliance on a section 204 statement to convict an accused, in the absence of other incriminating evidence, where a section 204 witness has recanted, whether such a statement is hearsay evidence if the section 204 witness is called to testify, and whether the Hearsay Act is applicable in such circumstances.

The first judgment found that the statements made by Mr Luzuko Makhala could not be considered as hearsay evidence since he had distanced himself from the two statements he had made, and testified in court that he was lying to the police when he made the statements, consequently absolving the applicants. Furthermore, no probative value could be placed on such statements in terms of Section 3(4) of the Hearsay Act because of Mr Luzuko Makhala's dishonesty, which consequently diminished his credibility.

In addressing the question whether the statements are admissions or confessions, the first judgment held that Sections 219 and 219A of the CPA, have no relevance in this matter. It reasoned that Section 219 of the CPA states that "no confession made by any person shall be admissible as evidence against another person", therefore the section prohibits admission of confessions made by one person against another person. It thus concluded that the statements were therefore not confessions, and held that Section 219A of the CPA is not applicable in this case, on the basis that the section 204 witness was not one of the accused in the trial court.

In conclusion, the first judgment found that the State failed to discharge the onus to prove the guilt of the applicants beyond a reasonable doubt and held that the applicants should have been acquitted. On the premise, it granted leave to appeal, upheld the appeal and substituted the order of the Supreme Court of Appeal with an order setting aside the convictions and sentences of the accused.

The second judgment, penned by Bilchitz AJ (Chaskalson AJ and Dodson AJ concurring) agreed with the outcome of the first judgment but differed with certain aspects of that judgment. The second judgment considered it necessary to examine the consequences of the finding of the first judgment that a prior inconsistent extra-curial statement where the witness testifies is not hearsay, and sets out a legal framework for determining the admissibility of such statements.

The second judgment took the view that the first judgment did not consider the legal principles that are applicable after its finding that the prior inconsistent extra-curial statement in question was not hearsay. Instead, it simply proceeded to consider whether the statement together with corroborating evidence constituted proof beyond a reasonable doubt. The second judgment found that, upon a determination that such a statement was not hearsay, the applicable law was the traditional common law rule which provides that such an extra-curial statement can only be utilised to impugn the witnesses' credibility, but can never serve as proof of the truth of its contents. The second judgment examined the rationale for the rule and found that there are no longer convincing reasons for it to be retained. The need for reform of this rule has been recognized by other South African courts, comparable foreign jurisdictions and by academic writers.

The second judgment articulated a new legal framework that applies to such statements as follows – first, the admissibility of such statements must be determined in a trial-within-a-trial to ensure the substantive realisation of the constitutional right to challenge and adduce evidence enshrined in section 35(3) of the Constitution. Secondly, in determining admissibility, a Court must, at a trial-within-a-trial, focus only on whether the statement is trustworthy. This entails establishing whether the evidence crosses the threshold of being sufficiently reliable to counteract the dangers attached to such statements, i.e. the lack of an oath; the ability of the judicial officer to assess demeanour and the lack of contemporaneous cross-examination. For this purpose, it is necessary for a judicial officer to consider various indicia of reliability – for analytical purposes, it is useful to distinguish between procedural and substantive dimensions of reliability.

The procedural dimension of reliability involves considering the various circumstances surrounding the taking of the statement and whether they provide adequate safeguards for reaching a conclusion that the statement was voluntarily made and is a faithful rendition of what the witness said. Most importantly, the modern ability to videotape evidence would allow for many of the concerns associated with such evidence to dissipate. On the other hand, substantive reliability relates to the content of the statement and whether it can be shown to be trustworthy through evidence that corroborates or contradicts it. If the threshold at the trial-within-a-trial is crossed, the admission of these statements does not determine the guilt of any of the accused. Such a conclusion can only be reached after an assessment of the ultimate reliability of the statement in light of the totality of evidence and whether all the evidence taken together proves guilt beyond a reasonable doubt.

The second judgement acknowledges that its proposed legal framework, which finds for the first time that a trial-within-a-trial must be held to consider the admissibility of prior inconsistent statements, was not applied in this case. Accordingly, the applicants are justified to raise questions about the substantive effect that omission had on their right to challenge and adduce evidence.

The second judgement finds that these concerns would naturally lead to the conclusion that this Court should refer the matter back to the High Court for a retrial in which a trial-within-a-trial could be conducted and the relevant principles concerning procedural and substantive reliability to prior inconsistent extra-curial statements can be applied. In considering this possibility, the second judgement states that this Court, as an appellate court must be mindful to ensure a just and equitable outcome in this particular case. The Court must take into account the fact that the applicants are currently incarcerated and that this case has already taken several years to work its way through the court system. Referring the matter back for a retrial would, according to the second judgment, only be justifiable if this Court is convinced that, in the event that the statements were to be admitted after a trial-within-a-trial, the corroborative evidence would be sufficient to sustain an ultimate conviction of the applicants. The second judgment finds that the corroborative evidence in this case is too weak to support such a conclusion with respect to the applicants and that there is, consequently, no good reason to order a retrial. As a result, the second judgment agrees with the order proposed in the first judgment that the conviction of the applicants must be overturned.